No. 183

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Supreme Court of the United States

OCTOBER TERM, 1957

DAVID CENTER, ET AL.

Petitioners

versus

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Attorney for Petitioners

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO.

DAVID CENTER, ROBERT ROBBINS,
ASSOCIATED ALUMINUM & METALS COMPANY,
ALSO KNOWN AS
ASSOCIATED METALS AND AS
ASSOCIATED METALS COMPANY,
A COPARTNERSHIP CONSISTING OF
DAVID CENTER AND ROBERT ROBBINS,
S. P. BENAMY
JOSEPH BENAMY
SHOWER DOOR COMPANY OF AMERICA,
A GEORGIA CORPORATION,
SHOWER DOOR COMPANY OF AMERICA,
A PARTNERSHIP, CONSISTING OF
ROBERT ROBBINS AS GENERAL PARTNER
AND OTHER PERSONS AS
LIMITED PARTNERS

Petitioners

versus

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above case on May 1, 1957.

OPINIONS BELOW

The District Court for the Northern District of Georgia rendered no opinion in this case. Its findings of fact and conclusions of law are found in the record at pages 302 through 312. The opinion of the Court of Appeals for the Fifth Circuit (R-325-332) is reported at 244 F. 2d. 207.

JURISDICTION

The judgments of the Court of Appeals for the Fifth Circuit were made and entered on May 1, 1957 (R-333) and the order of the Court of Appeals for the Fifth Circuit which denied the petition for rehearing was made and entered on May 29, 1957 (R-341). Copies of the judgment and the order are appended to this petition in the Appendix at pp 14. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Respondents filed suit against petitioners for certain sums due it under an open account for materials purchased from War Assets Administration. Petitioners filed counterclaims based on damages for breach of contract. The District Court gave judgment for the respondent on its entire claim but allowed a portion of petitioners' counterclaim and denied a portion of their counterclaim. The Circuit Court of Appeals affirmed the disallowance of the counter claims of petitioners and reversed that part of the District Court's judgment allowing a

portion of petitioners' counterclaim with direction to enter judgment for the respondent as to these counterclaims. The sole question presented is:

Whether it was necessary for petitioners to present their claims to the General Accounting Office as required by U. S. C. A. 28-2406, ever. though War Assets Administration had a statutory claims procedure and the claims had been presented to the Claims Division of War Assets Administration and denied by it.

STATUTES INVOLVED

The pertinent portions of 28 U.S.C.A. 2406; Section 30, Subsections (c) and (e) of the Surplus Property Act of 1944; and Section 204, Subsections (d) and (g) of the Federal Property and Administrative Services Act of 1949, (40 U.S.C.A. 485) are set forth in the appendix at pp 15-16

STATEMENT

We will state only the facts which bear on the question presented. In 1946 and 1947 petitioners, having established a $100,000.00 line of credit with War Assets Administration, made contracts with various offices of this agency for various quantities of aluminum. Some deliveries were made but other sales alleged to have been made were cancelled by respondent. The petitioners claimed they were damaged by these cancellations to the extent of the difference between the contract price and the market value at the time of the breach.

Respondent brought suit against petitioners for $31,496.67 which admittedly was owed. Petitioners counterclaimed for $33,251.56 under four separate claims. The trial Court found for petitioner in the amount of

$9,247.41 on one claim and $315.50 on another and found against them on two claims amounting to $22,154.02 and $1,534.63 respectively. Both petitioners and respondent appealed to the Circuit Court which passed on only one question, holding that respondents had not filed their claims with the General Accounting Office and therefore were not entitled to recover on any of their counterclaims. It therefore affirmed the trial Court on its finding for respondent, reversed the trial Court on its findings for petitioners and directed the trial Court to give judgment for respondent without any reduction because of petitioners' counterclaims.

The Court of Appeals held that the case of Skinner & Eddy Corp. v. McCarl, Comptroller General, 275 U.S. 1, had no application in the instant case and held that Section 204 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C.A. 485, Subsections (d) and (g), did not authorize the payment of a claim such as those made by petitioners. One of the reasons given for the latter holding was that the Federal Property and Administrative Services Act of 1949 was prospective and would not apply to transactions made in 1946. On their petition for rehearing petitioners called the attention of the Court of Appeals to Section 30, Subsections (c) and (e) of the Surplus Property Act of 1944 which contained almost the same provisions but the petition for rehearing was denied without comment.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below should be reviewed because it has decided an important question of Federal law which has not been settled by this Court, unless this Court decided the question in the case of

Skinner & Eddy Corp. v. McCarl, Comptroller General, as petitioners contend. If that case did decide the question then the Circuit Court decided the case erroneously. Petitioners respectfully submit that the question is an important one of Federal Administration and should be settled by this Court.

2. It is vitally important to the public generally to know definitely whether or not, when dealing with a Federal Administrative Agency which has set up a procedure for handling claims, a person must go through the claims procedure of that agency and then before his claim can be adjudicated in a Court he must also go through a further administrative claim procedure with the General Accounting Office.

3. The question presented by this case is of great and recurring significance in the administration of any Federal agency with the power to contract. The serious implications of the decision below in relation to public dealings with Federal agencies make the case an appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Ben Kohler, Jr.

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Atlanta 3, Georgia
Counsel For Petitioners.

APPENDIX TO PETITION FOR CERTIORARI

OPINION OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 16314

UNITED STATES OF AMERICA,
Appellant-Appellee,

versus

DAVID CENTER, ET AL,
Appellees-Appellants.
(AND REVERSE TITLE)

Appeals from the United States District Court for the Northern District of Georgia

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(May 1, 1957)

Before HUTCHESON, Chief Judge, and TUTTLE and JONES, Circuit Judges.

TUTTLE, Circuit Judge: The United States appeals from a judgment of the trial court sitting without a jury in a suit brought by it for the recovery of a balance

alleged to be due from the sale of aluminum products by the War Assets Administration. The basis of the Government's appeal is that the trial court allowed a reduction in the amount of the Government's recovery by reason of two alleged breaches of other contracts by which the War Assets Administration agreed to sell additional aluminum which it later refused to deliver.

The defendants in the trial court also appeal by cross-bill from a denial of the trial court of their claim of damages from the breach of additional alleged contracts to sell aluminum which the War Assets Administration thereafter withdrew from sale.

Numerous interesting questions of Government contracting procedures and remedies for the breach of contracts of sale by Government agencies are presented by the respective briefs of the parties. In the view we take of the matter, however, only one of these questions need be resolved—that is when the Government sues for the balance due on a contract of sale may the defendant set off against the admitted purchase price a claim which had not previously been presented to and disallowed by the General Accounting Office.[1]

Concluding as we do that this question must be answered in the negative, it is not necessary for us to consider the other points raised by the appeal and cross-appeal.

[1] "§2406. Credits in actions by United States; prior disallowance.

In an action by the United States against an individual, evidence supporting the defendant's claim for a credit shall not be admitted unless he first proves that such claim has been disallowed, in whole or in part, by the General Accounting Office, or that he has, at the time of the trial, obtained possession of vouchers not previously procurable and has been prevented from presenting such claim to the General Accounting Office by absence from the United States or unavoidable accident. June 25, 1948, c.646, 62 Stat. 972." 28 U.S.C.A. §2406.

Only the facts necessary to an understanding of the court's conclusion on this controlling question need be stated.

During the years 1946 and 1947 appellees in the principal appeal, whom we shall hereafter speak of as defendants, made contracts with various offices of the War Assets Administration, under which they purchased various quantities of aluminum, having previously established a credit of $100,000 with the Administration. Some deliveries were made but other sales alleged by defendants to have been made were cancelled. The defendants contend as to the cancelled sales that they were damaged by the refusal of the Administration to make deliveries at the contract price, to the extent of the difference between the contract price and the market value at the time of the breach.

This litigation was commenced by the filing of a suit by the United States seeking a recovery (after the abandonment of one item) of $31,496.67. The defendants claimed damages under their set-offs of $33,251.56, representing four separate classes of claims. Of these the trial court found in their favor to the extent of $9,247.41 on one set of claims, and $315.50 on another, rejecting their claims of $22,154.02 and $1,534.63, on the ground of a failure of proof to support them. The Government contends that the court erred in allowing the two items because it is admitted by defendants that no claims were filed with the General Accounting Office, and the defendants contend that the court erred in not finding in their favor with respect to the two items disallowed.

As we have previously stated, we do not consider it necessary to pass upon the question as to whether the

trial court had jurisdiction to entertain a set-off or counter-claim of the sort here asserted as to the item of $22,154.02, this being in excess of the jurisdictional amount of $10,000 for which an original suit could be filed by defendants against the United States under the Tucker Act, 28 U.S.C.A. §2406.[2] Nor need we pass upon the question as to whether there was sufficient evidence of the execution of a contract for the sale of the aluminum, the alleged breach of which gave rise to the $22,154.02 claim, nor whether such claim, if originally valid, was barred by the six year statute of limitations.

The trial court, discussing the requirement of section 2406 that before evidence supporting the defendant's claim for a credit can be admitted he must first prove that such claim has been disallowed by the General Accounting Office, held that the filing of a claim with the War Assets Administration satisfied this requirement. The court based this conclusion on the provisions of section 204 of the Federal Property & Administrative Services

[2]On this issue it might be questionable whether a district court could entertain jurisdiction to pass on such a claim even to the extent of allowing it up to the jurisdictional amount of $10,000. Thompson Foundry & Machine Co. v. United States (M.D.Ga.), 67 F.Supp. 121; Pioneer Gen-E-Motor Corp. v. Department of the Army and United States of America (N.D.Ill.), 135 F.Supp. 879. But the Supreme Court in its opinion in Natl. City Bank of New York v. Republic of China, et al, 348 U.S. 356, 365, stated: "An American . . . could counterclaim—to the extent of the Government's claim—in a suit by the United States in any court, 28 U.S.C. §2406; . . . "; however, the precise question as to the construction of §2406 was not before the Court in the National City Bank case.

Act of 1949, 40 U.S.C.A. §485; referring particularly to subsections (d) and (g) thereof.[3]

Having in mind the precise nature of the claims here asserted by the defendants—that is claims for damages for lost profits for a breach of a contract of sale, we think it quite clear that nothing in this statute gives to the General Services Administrator the power to allow such claims and withdraw federal funds for the payment of such claims. In light of the express requirement of Section 2406 that such claim be presented to the General Accounting Office, something more than the limited authority of another agency of the Government to make refunds to purchasers on the rescission of a sale or the settlement of any right of the Government with respect to a credit where credit has been extended must be found to create an exception to its requirements. Moreover, it is not at all plain that even the powers granted under sub-section (d) as to refunds to purchasers would be operative as to transactions concluded several years before the enactment of the Property Management Act, since the authorization for the creation of the special

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[3] "Special account deposits

"(d) Any Federal agency disposing of surplus property under this subchapter (1) may deposit, in a special account with the Treasurer of the United States, such amount of the proceeds of such dispositions as it deems necessary to permit appropriate refunds to purchasers when any disposition is rescinded or does not become final, or payments for breach of any warranty, and (2) may withdraw therefrom amounts so to be refunded or paid, without regard to the origin of the funds withdrawn.

. . . .

"Management of credit, leases, and permits on property

"(g) Where credit has been extended in connection with any disposition of surplus property under this subchapter or by War Assets Administration (or its predecessor agencies) under the Surplus Property Act of 1944, or where such disposition has been by lease or permit, the Administrator shall administer and manage such credit, lease, or permit, and any security therefor, and may enforce, adjust, and settle any right of the Government with respect thereto in such manner and upon such terms as he deems in the best interest of the Government."

40 U.S.C.A. §485 (d), (g), 63 Stat. 388, as amended, 68 Stat. 1051 (formerly 40 U.S.C. §485 (c), (f)).

account is prospective by its terms and there is no indication that there was any such fund from which claims for refunds resulting from 1946 transactions could be paid, even if the authority to make such payment as to future transactions and rescissions was granted by sub-section (d).

It is apparent that the authority to make *refunds* refers to the repayment of the purchase price received from vendees in case the sale is later rescinded or any warranties that had been made in its connection had been breached. This is quite different from authority to settle an unliquidated claim for damages for lost profits where a breach of a contract of sale is involved on which the purchaser had not yet made any payments to the Government.

As to sub-section (g), it seems clear that the authorization there was to permit the Administrator to settle the claims of the United States arising out of credits authorized under the War Assets Administration's operation, but not to make payments on claims for breach of contracts asserted by debtors of the Government.

There is nothing in *Skinner & Eddy Corp., v. McCarl, Comptroller General,* 275 U.S. 1, that would authorize a holding that the submission of a claim either to the War Assets Administration or to the General Services Administrator would satisfy the requirements of section 2406.

There are numerous cases applying this statute. See in this Circuit *Fitzsimmons v. United States,* 54 Fed. 812, and see 3 Moore, Federal Practice ¶13.26 at 67, 68, and cases there cited. The only exceptions called to our attention or which we have been able to find from the rigid

requirements of Section 2406 are in instances in which legislation authorizes the adjustment and payment of the claims of the nature here asserted by an independent government corporation or other agency. Cf. *Skinner & Eddy Corp. v. McCarl, Comptroller General, supra,* and *United States v. Paddock* (5 Cir.), 187 F. 2d 271. Obviously if an agency of the Government has no power to allow the claim there is no reason for permitting a submission to it to satisfy the requirement that it be submitted to the General Accounting Office. A careful review of the action by the War Assets Administration and the General Services Administration in this very case clearly indicates that these Government agencies declined consideration of the breach of contract claims because they had no funds out of which such damage claims could be paid. Thus the final denial of the $22,251.02 claim stated: "The claim appears to be solely for loss of anticipated profits and it is well settled that claims for anticipated profits which are in the nature of claims for unliquidated damages for breach of contract may not be paid or adjusted under appropriations, in the absence of specific provision therefor in the appropriation."

Similar language was used in the rejection of the claim for $9,247.41 relating to the Detroit transaction and of the claim for $1,534.63, which the trial court found was not supported by the evidence. This supports our construction of the provisions of 40 U.S.C.A. §485 (d) above, it appearing that no special fund or deposit had been authorized for the disposition of unliquidated claims for breach of contract under the Surplus Property Act of 1944, and nothing in sub-section (d) itself created such fund or granted such authority. Congress has therefor not authorized any exception here to the requirement

that any counter-claim or set-off of the nature of an unliquidated claim for damages for breach of contract must first be submitted to the General Accounting Office and be disallowed before being available to reduce the amount of the Government's claim.

The two groups of claims allowed by the trial court, both having been unliquidated claims for damages for breach of contract, and not having been presented to the General Accounting Office for its action, were improperly allowed as credits against the claim of the United States. The two other groups of claims disallowed by the court being subject to the same infirmity, the trial court did not err in not allowing them. The judgment is affirmed to the extent that it permitted recovery by the United States and is reversed to the extent that it reduced the Government's claim by the defendants' cross-claims.

The case is remanded for entry of judgment in accord with this opinion.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit
New Orleans, Louisiana

JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUDGMENT

Extract from the Minutes of May 1, 1957.

UNITED STATES OF AMERICA,

No. 16314

versus

DAVID CENTER, ET AL.,
(AND REVERSE TITLE)

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, to the extent that it permitted recovery by the United States; and that said judgment be, and it is hereby, reversed to the extent that it reduced the Government's claim by the defendants' cross-claim; and that this cause be, and it is hereby, remanded to the said District Court for entry of judgment in accordance with the opinion of this Court.

TITLE 28, SECTION 2406, U.S.C.A.:

"Section 2406. Credits in actions by United States; prior disallowance.

In an action by the United States against an individual, evidence supporting the defendant's claim for a credit shall not be admitted unless he first proves that such claim has been disallowed, in whole or in part, by the General Accounting Office, or that he has, at the time of trial, obtained possession of vouchers not previously procurable and has been prevented from presenting such claim to the General Accounting Office by absence from the United States or unavoidable accident." June 25, 1948, c.646, 62 Stat. 972."

Subsections (d) and (g) of Title 40 U.S.C.A. Section 485, 63 Stat. 388, as amended, 68 Stat. 1051, (formerly 40 U.S.C. Section 485 (c), (f)):

"SPECIAL ACCOUNT DEPOSITS"

"(d) Any Federal agency disposing of surplus property under this subchapter (1) may deposit, in a special account with the Treasurer of the United States, such amount of the proceeds of such dispositions as it deems necessary to permit appropriate refunds to purchasers when any disposition is rescinded or does not become final, or payments for breach of any warranty, and (2) may withdraw therefrom amounts to be refunded or paid, without regard to the origin of the funds withdrawn."

"MANAGEMENT OF CREDIT, LEASES AND PERMITS ON PROPERTY"

"(g) Where credit has been extended in connection with any disposition of surplus property under this sub-

chapter or by War Assets Administration (or its predecessor agencies) under the Surplus Property Act of 1944, or where such disposition has been by lease or permit, the Administrator shall administer and manage such credit, lease or permit, and any security therefor, and may enforce, adjust, and settle any right of the Government with respect thereto in such manner and upon such terms as he deems in the best interest of the government."

Subsections (c) and (e) of Section 30 of the Surplus Property Act of 1944, 58 Stat. 765, (formerly Title 50 App. 968 et. seq.).

"(c) To the extent authorized by the Board, any Government agency disposing of property under this Act (1) may deposit, in a special account with the Treasurer of the United States, such amount of the proceeds of such dispositions as it deems necessary to permit appropriate refunds to purchasers when any disposition is rescinded or does not become final, or payments for breach of any warranty, and (2) may withdraw therefrom amounts so as to be refunded or paid, without regard to the origin of the funds withdrawn."

"(e) Where the disposal agency acquires or retains any mortgage, lien or other interest as security in connection with any transfer or disposition or property under this Act, the disposal agency shall retain, preserve and manage such security and may enforce and settle any right of the Government with respect thereto, in such manner and upon such terms as it deems in the best interest of the Government. The Board may prescribe regulations to govern the exercise of the authority granted under this subsection."